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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Zen Laboratory LLC, an Arizona limited liability company,

Plaintiff,

v.

Popsify LLC, a New York limited liability company,

Defendant.

No. 4:22-cv-00466-TUC-SHR (MSA)

**FIRST AMENDED COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff Zen Laboratory LLC (“Zen Laboratory”), by and through counsel, brings this action for damages and injunctive relief against Defendant Popsify LLC (“Popsify” or “Defendant”).

**INTRODUCTION**

1. Plaintiff Zen Laboratory is an Arizona-based innovative and popular toy retailer. Zen Laboratory offers a variety of children’s toys, including fidget toys, playmats, splash pads, and other products.

2. Defendant Popsify LLC is a New York company that is blatantly and willfully violating Zen Laboratory’s intellectual property rights by copying and using Zen Laboratory’s copyrighted and trademarked product packaging, product copy, trademarks, and trade dress to sell nearly identical children’s toy products to U.S. consumers, including on the ecommerce platform Amazon.

3. Zen Laboratory asserts claims for: (a) copyright infringement of its graphic images, product copy, and product packaging designs under the Copyright Act of 1976, 15

1 U.S.C. § 501; (b) unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);  
2 (c) misrepresentation under the Digital Millennium Copyright Act, 17 U.S.C. § 512(f); and  
3 (d) state trademark infringement and unfair competition under Arizona common law. Zen  
4 Laboratory is seeking preliminary, and permanent injunctive relief against Defendant, and  
5 damages, costs, and attorneys' fees to the extent permitted by law.

#### 6 **PARTIES**

7 4. Plaintiff Zen Laboratory LLC is an Arizona limited liability company whose  
8 principal place of business is located at 1846 E. Innovation Park Dr., STE 100, Oro Valley,  
9 Arizona 85755.

10 5. Upon information and belief, Defendant Popsify LLC is a New York limited  
11 liability company whose principal place of business is located at 886 Dahill Rd., #708,  
12 Brooklyn, New York 11204.

#### 13 **JURISDICTION AND VENUE**

14 6. Pursuant to 28 U.S.C. §§ 1331 and 1338, this Court has subject matter  
15 jurisdiction over this action because this action arises under the laws of the United States,  
16 including the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*, the Lanham Act, 15 U.S.C.  
17 § 1051 *et seq.*, and the Digital Millennium Copyright Act, 17 U.S.C. § 512, *et seq.*

18 7. Pursuant to 28 U.S.C. § 1367, this Court has supplemental subject matter  
19 jurisdiction over Zen Laboratory's pendent state law claim because this claim is so related  
20 to Zen Laboratory's federal claims that they form part of the same case or controversy and  
21 derive from a common nucleus of operative facts.

22 8. This Court has personal jurisdiction over the Defendant because Popsify has  
23 purposely directed its actions to the State of Arizona.

24 9. Upon information and belief, Popsify owns and operates the ecommerce  
25 storefront at <https://www.amazon.com/s?i=merchant-items&me=AWSX1PBKVBSY6>,  
26 which is an interactive website on which Popsify uses Zen Laboratory's copyrighted and  
27 trademarked graphic image designs and product packaging designs to advertise and sell  
28 directly competing products to consumers in the State of Arizona. Popsify causes its

1 infringing products to be shipped within the United States including to consumers in the  
2 State of Arizona.

3 10. Venue is proper in this District pursuant to 28 U.S.C. § 1391 (b)–(c) in that a  
4 substantial part of the events or omissions giving rise to the claims occurred here and  
5 Popsify is subject to personal jurisdiction in this District.

6 **GENERAL ALLEGATIONS**

7 11. Zen Laboratory is an innovative and popular Arizona-based retailer in  
8 children’s toys, including fidget toys and fidget toy packs. Zen Laboratory sells its products  
9 through its website at <zenlaboratory.com> and through its product listings on  
10 <amazon.com>.

11 12. Zen Laboratory commercially introduced the Fidget Poppers Pack in August  
12 2021. The Fidget Poppers Pack was immediately a top seller, dominating the Amazon fidget  
13 toy category within a week of its introduction. The Fidget Poppers Pack, which is one of  
14 Zen Laboratory’s most popular products, has gained widespread recognition among  
15 consumers.

16 13. Zen Laboratory designed and uses distinctive product packaging, product  
17 copy, trademarks, and graphic images in connection with the Fidget Poppers Pack.

18 **Zen Laboratory’s Copyrights in Graphic Images, Product Copy,**  
19 **and Product Packaging Design**

20 14. Zen Laboratory owns copyrights in the product packaging, graphic images,  
21 and product copy at issue in this case. Zen Laboratory owns U.S. copyright registrations for  
22 (a) product packaging design, including product copy, associated with the Fidget Poppers  
23 Pack product (the “Fidget Poppers Pack Box Design”); and (b) a graphic image design used  
24 in connection with the Fidget Poppers Pack (the “Fidget Poppers Pack Main Image  
25 Design”). True and correct copies of (1) Zen Laboratory’s copyright applications for the  
26 Fidget Poppers Pack Main Image Design and Fidget Poppers Pack Box Design; and (2)  
27 screenshots from the Copyright Office Official Public Catalog showing Zen Laboratory  
28 owns and has registered the Fidget Poppers Pack Main Image Design and Fidget Poppers

**Fidget Poppers Pack Main**  
**Image Design**  
(Reg. No. VA0002320278)

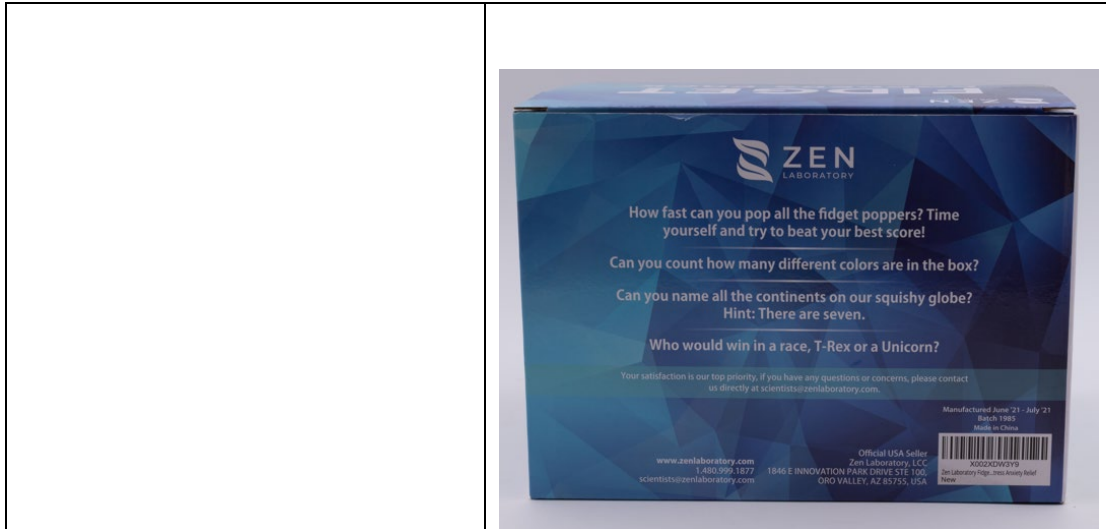


**ZEN**  
LABORATORY

# FIDGET POPPERS PACK

AGES 3+

**WARNING:**  
CHOKING HAZARD - Small parts.  
Not for children under 3 years.



### **Zen Laboratory's Trademark and Trade Dress Rights**

15. Zen Laboratory owns common law trade dress rights in the Fidget Poppers Pack Box Design for a variety of goods and services, including for children's toys and retail store services featuring children's toys.

16. The Fidget Poppers Pack Box Design is highly unusual, nonfunctional, and inherently distinctive trade dress which distinguishes Zen Laboratory's product from competitors, and consists of the following elements in combination: (1) the word "FIDGET" centered in large, all capital letters above the words "POPPERS PACK" in smaller all capital letters within a horizontal stripe on the front of the box; (2) three images representing toys within the box arranged in a horizontal row on the front of the box below "POPPERS PACK," including a fidget spinner, fidget popper sheet, and cube puzzle; (3) a background mosaic of geometric shapes in various color shades; (4) the back of the box, consisting of the company name centered, above several clauses of text relating to the toys within the box, including "How fast can you pop all the fidget poppers? Time yourself and try to beat your best score!" and "Can you count how many colors are in the box?," with each clause separated by a centered horizontal line which fades in towards the center of the box; (5) the sides of the box, consisting each of four images representing toys within the box, including but not limited to a football, toy bear, and snake puzzle, and (6) the above elements placed on a box of proportions of 8" length by 6" width by 6" height.

17. Zen Laboratory owns common law trademark rights in the FIDGET POPPERS PACK mark for a variety of goods and services, including for children's toys and retail store services featuring children's toys.

18. Millions of consumers have been exposed to the FIDGET POPPERS PACK mark and Fidget Poppers Pack Box Design since the Fidget Poppers Pack product was introduced in 2021. As a result of Zen Laboratory's continuous and widespread use of the FIDGET POPPERS PACK mark and Fidget Poppers Pack Box Design in commerce, consumers have come to associate the FIDGET POPPERS PACK mark and Fidget Poppers Pack Box Design with Zen Laboratory and its high-quality children's toys products. Based on its continuous and exclusive use of the FIDGET POPPERS PACK mark and Fidget Poppers Pack Box Design, Zen Laboratory owns exclusive common law rights to use the trademark and trade dress in connection with the sale of children's toys in the United States.

**Popsify's Infringement of Zen Laboratory's Intellectual Property Rights**

19. Without authorization, Popsify has copied, used, displayed, and distributed Zen Laboratory's intellectual property in connection with its sales of a competing children's toy product, infringing Zen Laboratory's intellectual property rights.

20. Until on or about September 25, 2022, Popsify prominently used and displayed images containing the FIDGET POPPERS PACK mark and substantially and confusingly similar copies of Zen Laboratory's Fidget Poppers Pack Main Image Design and Fidget Poppers Pack Box Design in connection with Popsify's retail offering of a children's fidget toy product (the "First Infringing Image Design"). A side-by-side comparison of the Fidget Poppers Pack Main Image Design and Defendant's Infringing Image Design is shown below:

**Zen Laboratory's Fidget Poppers Pack Main Image Design**

**Popsify's First Infringing Image Design**





21. On or about October 3, 2022, Popsify began prominently using and displaying an updated image containing the FIDGET POPPERS PACK mark and substantially and confusingly similar copies of Zen Laboratory’s Fidget Poppers Pack Main Image Design and Fidget Poppers Pack Box Design on its <Amazon.com> product listing (the “Second Infringing Image Design”). A side-by-side comparison of the Zen Laboratory Copyrighted Works and Defendant’s Second Infringing Image Design is shown below:

<u>Zen Laboratory's Copyrighted Works</u>	<u>Popsify's Second Infringing Image Design</u>
	



- 8 -



**Zen Laboratory's Copyrighted Works**

(Reg. No. VA0002321292)

**Popsify's Infringing Marketing**

(Reg. No. VA0002321292)



(Reg. No. VA0002321292)



23. Upon information and belief, Popsify also continues to use the FIDGET POPPERS PACK mark and a confusingly and substantially similar copy of the Fidget Poppers Pack Box Design as product packaging for its own competing children's fidget toy product (the "Infringing Product Packaging"). A side-by-side comparison of the Fidget Poppers Pack Box Design and Defendant's Infringing Product Packaging is shown below:

**Zen Laboratory's Fidget Poppers Pack**  
**Box Design**

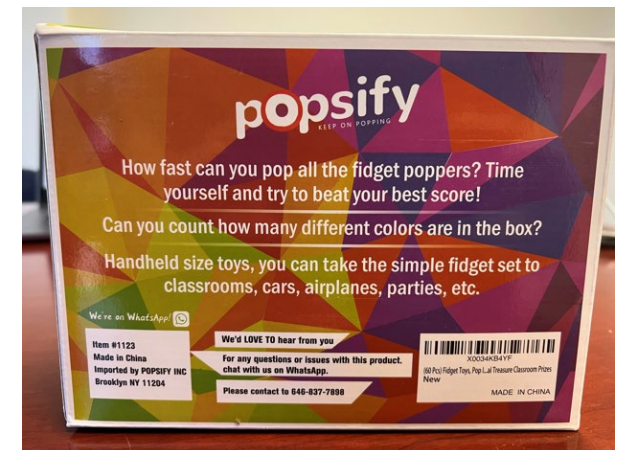


(Reg. No. VA0002321292)

**Popsify's Infringing Product Packaging**



(Reg. No. VA0002321292)







(Reg. No. VA0002321292)



(Reg. No. VA0002321292)



24. Upon information and belief, Popsify's only commercially available product is its children's fidget toy pack, offered for sale at <https://www.amazon.com/Fidgets-Autistic-Carnival-Treasure-Classroom/dp/B09QFVL6NR/>.

1           25.     Popsify knew or should have known of Zen Laboratory's preexisting rights  
2 in the FIDGET POPPERS PACK mark, Zen Laboratory Trade Dress, and Zen Laboratory  
3 Copyrighted Works.

4           26.     In any event, Popsify knew of Zen Laboratory's preexisting rights in the Zen  
5 Laboratory Trade Dress and Zen Laboratory Copyrighted Works on or about May 24, 2022,  
6 when Zen Laboratory notified Popsify of its infringement through Amazon Brand Services  
7 pursuant to the Digital Millennium Copyright Act.

8           27.     Moreover, Zen Laboratory delivered a demand letter to Popsify on September  
9 19, 2022 demanding it cease infringing Zen Laboratory's intellectual property rights.  
10 Although Popsify removed the First Infringing Image Design on or about September 25,  
11 2022, it continued infringing Zen Laboratory's other intellectual property. And, Popsify  
12 added the Second Infringing Image Design on or about October 3, 2022, embarking on yet  
13 another infringement of Zen Laboratory's intellectual property.

14           28.     On October 6, 2022, Zen Laboratory sent a letter to Amazon requesting that  
15 Popsify's listing be deactivated. Upon information and belief, Popsify's listing was  
16 deactivated by Amazon until November 7, 2022.

17           29.     Even though it was informed of Zen Laboratory's rights, Popsify has  
18 continued infringing Zen Laboratory's intellectual property rights. As of November 7, 2022,  
19 the photos on Popsify's Amazon listing had been edited to display a different packaging  
20 than the packaging a consumer would actually receive. A test buy confirmed that Popsify's  
21 product ships in the same infringing packaging as photographed above.

22           30.     On or about November 10, 2022, Zen Laboratory again requested to Amazon  
23 that Popsify's listing be deactivated. Upon information and belief, Popsify's listing was  
24 deactivated by Amazon on November 10, 2022.

25           31.     Popsify's course of conduct demonstrates that it is continuously attempting  
26 to reinstate its listing to sell through infringing packaging, despite its flagrant contravention  
27 of Amazon's terms of service and federal trademark and copyright laws.  
28



**Popsify’s Misrepresentations under the Digital Millennium Copyright Act**

32. On or about May 24, 2022, Zen Laboratory, pursuant to the Digital Millennium Copyright Act, issued a Notice of Infringement through Amazon Brand Registry alleging that Popsify’s First Infringing Image Design was an infringement of Zen Laboratory’s intellectual property rights.

33. After receiving Zen Laboratory’s takedown notice, Amazon Brand Registry removed the First Infringing Image Design.

34. Popsify submitted a counter-notice to Amazon Brand Services claiming a good faith belief that the material identified in Zen Laboratory’s Notice of Infringement “was removed or disabled as a result of mistake or misidentification.” Popsify submitted its counter-notice under penalty of perjury and with notice that providing false statements in a counter-notice can lead to civil penalties. A true and correct copy of Popsify’s counter-notice, as forwarded to Zen Laboratory by Amazon Brand Services, is attached as **Exhibit B**.

35. Upon information and belief, Popsify did not have a good faith belief that the material identified in Zen Laboratory’s Notice of Infringement was removed or disabled as a result of mistake or misidentification.

36. Upon information and belief, Amazon Brand Services permitted Popsify to continue using the First Infringing Image Design based on Popsify’s misrepresentations in its counter-notice.

37. Popsify’s conduct described herein deprives Zen Laboratory of exclusive control over its own intellectual property rights, is creating confusion or mistake among consumers, and is causing irreparable/immeasurable harm to Zen Laboratory’s goodwill such that there is no adequate remedy at law, all of which will continue unless enjoined by this Court.

**COUNT I**

**(Copyright Infringement Under 15 U.S.C. § 501)**

38. Zen Laboratory hereby incorporates by reference each of the allegations in the preceding paragraphs of this Complaint as if fully set forth herein.



1 Box Design, or confusingly similar variations thereof, in commerce in a manner that is  
2 likely to cause confusion, mistake, or deception as to the origin of Defendant's goods or  
3 commercial activities.

4 49. Upon information and belief, Defendant willfully committed trademark and  
5 trade dress infringement.

6 50. As a direct and proximate result of Defendant's trademark and trade dress  
7 infringement, Zen Laboratory has suffered and will continue to suffer irreparable harm and  
8 damages.

9 51. Zen Laboratory is entitled to injunctive relief and other remedies available  
10 under the Lanham Act, including, but not limited to, Defendant's profits, any damages  
11 sustained by Zen Laboratory, the trebling of any damages according to the circumstances  
12 of this case, attorneys' fees, costs, and prejudgment interest.

### 13 **COUNT III**

#### 14 **(Misrepresentation Under 17 U.S.C. § 512(g))**

15 52. Zen Laboratory hereby incorporates by reference each of the allegations in  
16 the preceding paragraphs of this Complaint as if fully set forth herein.

17 53. Each of the Zen Laboratory Copyrighted Works is an original work of  
18 authorship in a tangible form of expression.

19 54. Without Zen Laboratory's consent, Defendant copied and publicly displayed  
20 substantially similar copies of the Zen Laboratory Copyrighted Works, including the Fidget  
21 Poppers Pack Main Image Design and Fidget Poppers Pack Box Design, at <amazon.com>.

22 55. Upon information and belief, Defendant willfully committed copyright  
23 infringement.

24 56. Zen Laboratory filed a Notice of Infringement regarding Defendant's  
25 infringing use under the Digital Millennium Copyright Act, 17 U.S.C. § 512.

26 57. Defendant filed a counter-notice alleging the infringing material was removed  
27 or disabled as a result of mistake or misidentification.  
28

60. Zen Laboratory is entitled to monetary relief and other remedies available under the Digital Millennium Copyright Act, including, but not limited to, any damages sustained by Zen Laboratory, attorneys' fees, and costs.

**(Trademark Infringement and Unfair Competition under Arizona Common Law)**

62. Defendant has used, and unless enjoined, will continue to use the FIDGET POPPERS PACK mark, Fidget Poppers Pack Main Image Design, and Fidget Poppers Pack Box Design, or confusingly similar variations thereof, in commerce in a manner that is likely to cause confusion, mistake, or deception as to the origin of Defendant's goods or commercial activities.

63. Defendant's conduct constitutes trademark infringement, trade dress infringement, and misappropriation of the goodwill associated with Zen Laboratory's trademarks and trade dress and constitutes unfair competition in violation of Arizona common law.

64. Zen Laboratory is entitled to injunctive relief and other remedies available under Arizona common law, including any order necessary to restore Zen Laboratory any money which may have been acquired by means of such unfair competition.

WHEREFORE, Zen Laboratory seeks the following relief:

A. A preliminary and permanent injunction enjoining Defendant and its owners, principals, agents, officers, directors, members, servants, employees, successors, assigns, and all other persons acting in concert and participation with it, from (1) infringing the Zen



1 Laboratory Copyrighted Works, Fidget Poppers Pack Box Design, and Zen Laboratory's  
 2 FIDGET POPPERS PACK mark (or any other reproduction, counterfeit, copy, colorable  
 3 imitation or confusingly similar variation thereof), (2) attempting to reinstate or sell under  
 4 its infringing Amazon listing, and (3) other relief requested by Zen Laboratory;

5 B. Judgment in favor of Zen Laboratory against Defendant for copyright  
 6 infringement and damages in the form of, at Plaintiff's election: (a) actual damages and any  
 7 additional profit of Defendant; or (b) statutory damages, for each violation under 15 U.S.C.  
 8 § 1117;

9 C. Judgment in favor of Zen Laboratory against Defendant for unfair  
 10 competition and damages in form of Defendant's profits and any damages suffered by Zen  
 11 Laboratory under 15 U.S.C. § 1125(a);

12 D. Judgment in favor of Zen Laboratory against Defendant for  
 13 misrepresentation, in violation of 17 U.S.C. 512(g);

14 E. Judgment in favor of Zen Laboratory against Defendant for unfair  
 15 competition, in violation of Arizona common law;

16 F. An order to freeze Defendant's assets pending a final determination of  
 17 liability and damages;

18 G. An award of attorneys' fees and costs incurred by Zen Laboratory in  
 19 prosecuting this action under the Copyright Act, the Lanham Act, the Digital Millennium  
 20 Copyright Act, and otherwise as allowed under law; and

21 H. Any and all other relief the Court deems just, proper, fair, and equitable.

22 **DEMAND FOR JURY TRIAL**

23 Zen Laboratory hereby demands a jury trial on all its claims.

24 DATED this 22nd day of November, 2022.

25 LEWIS ROCA ROTHGERBER CHRISTIE LLP

26 By: /s/ Alexander LaCroix  
 27 Alexander LaCroix

28 *Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants for this case:

/s/ Christina Neely

201 East Washington Street, Suite 1200  
Phoenix, AZ 85004

**LEWIS**  **ROCA**